

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ORTHOPEDIC INNOVATION PTY, LTD.
and SURGIBIT IP HOLDINGS PTY,
LIMITED,

Plaintiffs,

v.

ONYX MEDICAL CORPORATION,

Defendant.

Case No. 17-cv-8753

COMPLAINT FOR

Plaintiffs, Orthopedic Innovation Pty, Ltd. (“OI”) and Surgibit IP Holdings Pty, Limited (“Surgibit”) (collectively, “Plaintiffs”), by their undersigned counsel, for their Complaint against Defendant, Onyx Medical Corporation (“Onyx”), allege as follows:

INTRODUCTION

1.

[REDACTED]

THE PARTIES

2. OI is a corporation organized and existing under the laws of Australia, with its corporate headquarters at 13 Lancaster Crescent, Collaroy, New South Wales, Australia. OI was formed to commercialize certain intellectual property pertaining to “Surgibit” orthopedic drill bits and other orthopedic products specially suited for drilling in bone.

3. Surgibit is a corporation organized and existing under the laws of Australia, with its corporate headquarters at 13 Lancaster Crescent, Collaroy, New South Wales, Australia. Surgibit was formed to cooperate with OI in the commercialization of Surgibit drill bits.

4. Together, Plaintiffs own, control, manage, and/or market all intellectual property pertaining to the above-mentioned Surgibit orthopedic drill bits and other orthopedic products

especially suited for drilling in bone, including but not limited to patents, trademarks, trade secrets, design, and/or manufacturing know-how and marketing knowledge. Collectively, Plaintiffs' intellectual property is referred to hereinafter as "Surgibit Technology." Products lawfully made according to Plaintiffs' intellectual property and embodying Plaintiffs' Surgibit Technology are marketed under the registered trademark "Surgibit" (collectively, "Surgibit Products").

5. Upon information and belief, Onyx is a Tennessee corporation with its principal place of business in Memphis, Tennessee, which transacts business nationwide [REDACTED]

[REDACTED]
[REDACTED].

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction under 28 U.S.C. § 1332 because this is an action between citizens or subjects of a foreign state and a citizen of a state subject to the jurisdiction of this Court, and the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs.

7. Upon information and belief, Onyx transacts business nationwide, including within the State of Illinois and including within this judicial District. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

8. Further, on information and belief, Onyx regularly solicits and conducts business in the State of Illinois, derives substantial revenue from goods sold in Illinois, and has sold and/or offered for sale [REDACTED] in the State of Illinois [REDACTED]

[REDACTED]

9. Further, upon information and belief, on or about April 2015, Onyx was acquired by Elos Medtech AB (“Elos”), a Swedish developer and manufacturer of medical products, in a transaction the details of which are presently unknown to Plaintiffs. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Notwithstanding, Elos completed the acquisition of Onyx with full knowledge of Plaintiffs' claims against Onyx.

10. [REDACTED]

[REDACTED]

[REDACTED]

11. The full extent of Elos' involvement, participation, and/or instruction of Onyx's complained of conduct will be the subject of discovery in this case.

12. On information and belief, venue is properly laid in this Court under 28 U.S.C. § 1391(b)(2), § 1391(b)(3), and/or § 1391(c)(2) because a substantial part of the events or omissions giving rise to the claims occurred within this District, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

FACTS COMMON TO ALL CLAIMS

The Advantage of Plaintiffs' Surgibit Technology

13. Plaintiffs, individually or collectively, have supported the use and sale of a variety of high quality orthopedic surgical instruments, including, among others, surgical drill bit devices marketed under the brand "Surgibit" sold to surgical implement providers, and/or orthopedic companies, and/or surgeons, and/or hospitals throughout the United States, including within Illinois and including within this judicial District.

14. The particular orthopedic utility and benefit of Plaintiffs' Surgibit Products is an enhanced capability to more accurately drill in human bone with minimal drill bit slippage, "skiving," and "walking"; less damage to the bone, including, for example, from excessive heat generation leading to thermal necrosis (i.e., the death of affected bone cells); better aligned holes; and reduced drill bit breakage.

15. It is virtually impossible to achieve the same level of aforementioned orthopedic utility and benefit without using the Surgibit Technology [REDACTED].

Onyx's Product Innovation Status [REDACTED]

16. An article dated May 26, 2003 in the *Memphis Business Journal*, which quoted Onyx's then president, Laraine Gilmore, characterized Onyx's "[f]uture growth as predicated on the company diversifying into new product lines, something that Laraine Gilmore says is unlikely at this time." (Article attached as Ex. A hereto.)

[REDACTED]

17. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

18. [REDACTED]

[REDACTED] a copy of which is attached as Exhibit B hereto and incorporated herein by reference

[REDACTED].

19. [REDACTED]

[REDACTED]. (Ex. B.)

20.

[REDACTED]

21.

[REDACTED]

[REDACTED].

22.

[REDACTED]

23.

[REDACTED]

24.

[REDACTED]

25.

[REDACTED] (Ex. B [REDACTED] [REDACTED]
[REDACTED].)

26.

[REDACTED]

[REDACTED]

(Ex. B, [REDACTED].)

27. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. B, [REDACTED].)

28. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. B, [REDACTED].)

[REDACTED]

[REDACTED]

(Ex. B, [REDACTED].)

30. [REDACTED]

[REDACTED]

[REDACTED]

(Ex. B, [REDACTED].) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (*Id.*)

31. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (*Id.*)

32. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

33. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

34. [REDACTED]

[REDACTED]

[REDACTED] ([REDACTED], attached as

Ex. D hereto.)

35. [REDACTED]

[REDACTED]

[REDACTED] (*Id.*)

36. As a continuing strategy to commercialize the Surgibit Technology in the United States, Surgibit was formed and organized as a holding company to own all intellectual property pertaining to Surgibit Technology, including Surgibit Trade Secrets and any patents issued embodying the Surgibit Technology.

[REDACTED]

37. [REDACTED]

[REDACTED] a copy of which is attached hereto as Exhibit E and incorporated herein by reference.

38. [REDACTED]

[REDACTED]

[REDACTED] (Ex. E, [REDACTED]) [REDACTED]

[REDACTED] (Ex. E, [REDACTED]).

39. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. E, [REDACTED]).

40. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] A copy of the

[REDACTED] is attached hereto as Exhibit F and incorporated herein by reference.

41. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. F.) [REDACTED]

[REDACTED]

[REDACTED] (*Id.*) [REDACTED]

[REDACTED] (*id.*), [REDACTED]

[REDACTED] (Ex. E).

42. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. E, [REDACTED].)

43. [REDACTED]

[REDACTED]

[REDACTED].

44. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED]

45. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. E, [REDACTED]). [REDACTED]

[REDACTED]

[REDACTED].

46. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

47. [REDACTED]

[REDACTED].

48. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

49. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

50. [REDACTED]

[REDACTED]

[REDACTED] (Ex. B), [REDACTED]

[REDACTED] (Ex. E). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

51. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

52. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

53. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

54. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

55. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The ODT Article

56. An article published in the January/February 2012 edition of *ODT Magazine* (“ODT,” which stands for “Orthopedic & Design Technology”), entitled “*Instrumental Abilities*,” detailed Onyx’s success in marketing, manufacturing, and selling surgical drill bits. (“ODT Article,” a copy of which is attached as Ex. G hereto.)

57. In the ODT Article, Onyx’s then-Managing Director of Business and Quality Operations and now-Chief Executive Officer, Jodie Gilmore, attributes Onyx’s success to its practice of seeking “to develop optimal cutting geometries” in the cutting instruments Onyx manufactures for its customers to achieve “good targeting and proper alignment” so that the cutting instruments “do not skive and stay targeted where the doctor requires them [which] reduces breakage or damage during surgery and creates a better-aligned hole for implant insertion.” (Ex. G.) [REDACTED]

[REDACTED]

[REDACTED]

58. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

59. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

60. A May 10, 2017 online article entitled “*Elos Medtech’s Advantage Lies in Nimble Approach to Serve Orthopaedic Customers*” includes excerpts of an interview with Elos’ Group Chief Executive Officer, Jan Wahlström. (<http://www.bonezonepub.com/1649-elos-medtech-s-advantage-lies-in-nimble-approach-to-serve-orthopaedic-customers> the “BoneZone Interview”), Ex. H hereto.) In the BoneZone Interview, Mr. Wahlström discusses Onyx’s “innovative” contribution to its contract manufacturing customers’ development projects, and confirms Onyx’s integral involvement in such customers’ product design process “from idea to finished product,” including work “optimizing design.” (*Id.*)

61. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

62. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. B).

63. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ([REDACTED] Ex. I hereto). [REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

64. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

65. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

66. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

67.

[REDACTED]

68.

[REDACTED]

69.

[REDACTED]

70.

[REDACTED]

71.

[REDACTED]

[REDACTED] (Ex. B).

Plaintiffs Learn of Onyx's Impending Acquisition

72. In or about late 2014, Plaintiffs learned that Onyx was looking for strategic

partners to (according to Onyx) specifically expand the Surgibit business.

Onyx was acquired due to its success in the orthopedic market, which success, on information and belief, [REDACTED]

73.

[REDACTED] A copy of the [REDACTED] is attached hereto as Exhibit J.

74.

[REDACTED]

[REDACTED].

75.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

76.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The details of the Onyx Acquisition are unknown to Plaintiffs but will be the subject of discovery in this action.

[REDACTED]

77.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

78.

[REDACTED]

[REDACTED]

[REDACTED]

79. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

80. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

81. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

82. [REDACTED] Onyx and Plaintiffs had jointly promoted Surgibit Products at the AAOS and Onyx's trade show booths at OMTEC almost every year since 2005. However, in or about January 2017, Onyx/Elos informed Plaintiffs that for the 2017 AAOS trade show in San Diego, California, Onyx/Elos would not be attending the AAOS.

83. [REDACTED]

[REDACTED]

[REDACTED]

COUNT I

[REDACTED]

84. Plaintiffs repeat and reallege paragraphs 1 through 83 of this Complaint as if set forth herein, and further state:

85. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

86. Upon further information and belief, Onyx and its officers and managing agents (including, but not limited to, Elos and its employees, officers, and managing agents), [REDACTED]

[REDACTED]

[REDACTED]

87. [REDACTED]

COUNT II

[REDACTED]

88. Plaintiffs repeat and reallege paragraphs 1 through 87 of this Complaint as if set forth herein, and further state:

89. [REDACTED]

90. [REDACTED]

[REDACTED]:

- a. [REDACTED]
[REDACTED];
- b. [REDACTED]
[REDACTED];
- c. [REDACTED]
[REDACTED];
- d. [REDACTED];
- e. [REDACTED]
[REDACTED]; and
- f. [REDACTED].

91. [REDACTED]

[REDACTED] (as previously defined at ¶ 44, [REDACTED]).

92. [REDACTED]

[REDACTED].

93. [REDACTED].

94. [REDACTED]

[REDACTED]

[REDACTED].

95. [REDACTED]

[REDACTED]

[REDACTED] (Ex. B) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

96. [REDACTED]

[REDACTED]

[REDACTED].

97. [REDACTED]

[REDACTED].

98. [REDACTED]

[REDACTED].

COUNT III

[REDACTED]

[REDACTED]

99. Plaintiffs repeat and reallege paragraphs 1 through 98 of this Complaint as if set forth herein, and further state:

100. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

101. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

102. [REDACTED]

[REDACTED]

[REDACTED].

103. [REDACTED].

COUNT IV

[REDACTED]

104. Plaintiffs repeat and realleged the allegations contained in paragraphs 1 through 103 as if set forth herein, and further state:

105. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request a judgment in their favor and against Defendant Onyx, ordering:

A. That Judgment be entered in favor of Plaintiffs and against Onyx on Counts I through IV of the Complaint;

B. That, in addition, Onyx be ordered to pay to Plaintiffs damages pursuant to Plaintiffs' claims under [REDACTED], including such damages as have been sustained by each Plaintiff as a result of Onyx's violations of such law up to the time of trial, together with interest and costs, which damages may include, but are not necessarily limited to, [REDACTED] [REDACTED] damages to which Plaintiffs may be entitled under the law;

C. That Onyx, and each of its officers, directors, agents, servants, employees, and representatives, and those persons in active concert or participation with them or any of them, be preliminarily and permanently enjoined and restrained from [REDACTED] [REDACTED];

D. That Onyx, and each of its officers, directors, agents, servants, employees, and representatives, and those persons in active concert or participation with them or any of them, be preliminarily and permanently enjoined and restrained from directly or indirectly [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED];

E. That Onyx be directed to account to Plaintiffs for all gains, profits, and advantages realized by Defendant from [REDACTED] [REDACTED]

[REDACTED], up to and including the time of trial;

F. That, in addition, Onyx be ordered to pay to Plaintiffs, pursuant to Plaintiffs' claims under [REDACTED] [REDACTED], such reasonable attorney fees incurred by each Plaintiff in prosecuting these claims;

G. That the Court enter an Order of [REDACTED] [REDACTED] requiring Onyx, and each of its officers, directors, agents, servants, employees, and representatives, and those persons in active concert or participation with them or any of them, to [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED];

H. That Onyx be required to [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED];

I. That all damages awarded to Plaintiffs due to Onyx's [REDACTED] [REDACTED] be enhanced by the Court pursuant to [REDACTED] and/or the Court's inherent power to enhance damages awards;

J. That Plaintiffs recover punitive damages due to Onyx's egregious conduct to the maximum extent permitted under law;

- K. That Plaintiffs recover their costs and disbursements herein;
- L. That Plaintiffs recover [REDACTED]; and
- M. That Plaintiffs be awarded such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury for all issues so triable.

Respectfully submitted,

/s/ Matthew G. McAndrews

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